Supreme Court, U.S.
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Supreme Court of the United States
Case Number _____

C. LESTER PAUL, individually and d/b/a T&P ENTERPRISES, INC., THE VIKING GROUP, INC., and BLUEGRASS DRILLING CORPORATION; et al.,

Petitioners

V.

ERIN MESSING, as executrix of the estate of Andrew Messing

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Hon. John Harlan Callis, III
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United States Supreme Court Rule 14.1(a)

THE QUESTIONS PRESENTED FOR REVIEW:

1. Whether the Sixth Circuit opinion failed to apply the appropriate standard for Summary Judgment or a conflicting authority with other circuits and whether districts courts overuse Summary Judgment to dispose of contentious civil actions.

2. Whether the Sixth Circuit Opinion reversing the District Court on the liability of Michael Paul for corporate debt was an application of conflicting authority around the country and between the Circuits which this Court can decide the controlling position.

United States Supreme Court Rule 14.1(b)

CORPORATE DISCLOSURE STATEMENT BY RULE 29.6:

In addition to the parties names in the caption, the following were defendants in the proceedings below and are petitioners in this action: Delstar Resources, Inc., a Nevada corporation; Delstar Resources, Inc., a Kentucky corporation; T & P Enterprises, Inc., a Kentucky corporation; Bluegrass Drilling Corporation, Inc., a Kentucky corporation; and Delta Gas Corporation, a Georgia corporation are not Publicly Held corporations and neither are 10% of stock in any of these Petitioner corporations owned by a Publicly Held corporation.

United States Supreme Court Rule 14.1(c)

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PE[illegible]TION FOR WRIT OF CERTIORARI

Petitioners, C. Lester Paul, et. al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED BY COURTS BELOW:

1. ***ERIN MESSING, et al V. C. LESTER PAUL, et al,*** Case No. 00-168-HRW, Judgment, Court Record No. 103 (September 15, 2003); Order (on Motion to Alter or Amend Judgment), Court Record No. 110, pages 129-143, (November 21, 2003); Amended Judgment, Court Record No.111, pages 144-145 (November 21, 2003).

2. ***ERIN MESSING, et al V. C. LESTER PAUL, et al,*** 2005 WL 430328 (6th Cir.(Ky.)); 2005 Fed.App. 0143N; Sixth Circuit Case No. 03-6655, 04-5058, Opinion Filed February 23, 2005, Not Recommended for Full Text Publication; Order (Denied Petition for rehearing) (July 29, 2005).

United States Supreme Court 14.1(e)

JURISDICTION

(i) This Petition for Writ of Certiorari seeks review of the Sixth Circuit Opinion filed February 23, 2005.

(ii) The Sixth Circuit Order filed July 29, 2005. The Court Order Granted the Motion for Extension of Time to File Petition for Rehearing as Timely. The Court Order Granted the Motion to Recall Mandate. The Court Order Denied the Petition for Rehearing.

(iii) This section does not apply to this Petition.

(iv) The United States Supreme Court has jurisdiction of this case on its review of the Courts of Appeals in cases under 28 U.S.C.A. s 1332. Diversity of citizenship; amount in controversy; costs. The U.S. District Court had jurisdiction in this case under 28 U.S.C.A. s 1332.(a)(1) as a dispute of greater than $75,000.00 between citizens of different states. *See* **(g)(ii) of this Rule.** The United States Supreme Court can consider this Petition for Writ of Certiorari as it is filed within 90 days after the entry of the Sixth Circuit Order filed July 29, 2005. U.S.Sup.Ct. Rule 13.1.

United States Supreme Court Rule 14.1(g)

STATEMENT OF CASE AND MATERIAL FACTS

The undersigned Counsel entered his appearance to substitute for the previous counsel Hon. Dennis Franklin Janes. Counsel entered his appearance on behalf of Petitioner which were designated in the Sixth Circuit *Defendants-Appellants Cross-Appellee.*

The Sixth Circuit Opinion filed February 23, 2005, did not recognize facts that were brought to the Court's attention by Petition for Rehearing. That Court's opinion failed to recognize the fact that in 1996 Andrew Messing invested in Gasbusters, the entity involved with Petitioners for natural gas production. Andrew Messing invested because of his brother Gil Messing and William Polan. (Memo in Support Mot. for Summ. J., Ex. 17, Affidavit., Apx.___) Also, the fact, that it is undisputed that Gasbusters was not a proper Limited Partnership in 1996, not on March 5, 1997, not until March 11, 1997.(Memo. Objecting to Summ. J., Exh. 11, Ky. Sec. of State Printout Re. Gasbusters dated 2/11/2003, Apx.____ ; Depo. Lester Paul Vol.II, Pgs. 10-18; R.74, Memo. Objecting to Summ. J., Apx.___). The Counterclaims against the Respondent were based upon the transactions and Contracts entered into February 13, 1996 with Gasbusters (including Andrew Messing) before the defects in the Limited Partnership were corrected more than a year later, with Andrew Messing then President of FL-Gasbusters, Inc. (Depo Lester Paul Vol. II, pgs. 19-20, Apx.___). Therefore, the fact missed by both Courts is that Andrew Messing was in Gasbusters

defective Limited Partnership in 1996 and had General Partnership liability for the Transactions of February 13, 1996, until repaired March 11, 1997, which is the basis for the Counterclaim against Respondents to setoff against Respondent's claims in their Complaint in the U.S. District Court. (R.25, Answer and Counterclaim, Apx.___).

The Sixth Circuit Court's opinion fails to recognize the fact that all ownership of Bluegrass Drilling; Delta GA; and Delstar NV, were released by C. Lester Paul and Margaret Paul to their children on March 1, 1997. (Depo. Michael W. Paul, Sr., pgs 10-14, and 26-29, Apx.___; Depo. Lester Paul Vol. I, 20-25, Apx. pg. ___). This Court's opinion fails to recognize that Michael W. Paul, Sr., signed the Promissory Note as President of Delstar NV, a valid Nevada Corporation; as President of Delta Gas, a valid Georgia Corporation. When he asked about Delstar KY, both he and Lester Paul explained that Delstar KY was empty and had nothing in it as all assets were put in Delstar NV; it had nothing to do with the leases anymore. Respondent Messing was completely aware of the Delstar KY status. It was not administratively closed until November 3, 1997. Therefore, when Michael w. Paul, Sr., signed the note, Delstar Ky. existed. All other notes were signed by C.Lester Paul. (Messings Appendix to Memo. In Supp. of Mot. For Summ. J., Ex.8, Admissions No. 20, pg.8, Apx.___; Depo. Michael Paul , pgs. 10-20, 26-35, Apx.___; Depo. Lester Paul Vol. I, pgs.25-38, Apx.___). The Sixth Circuit Opinion used interpretations of facts only to justify its erroneous application of law.

United States Supreme Court Rule 14.1(h)

Reasons For Granting The Petition

Review by this Court of the decision of the Sixth Circuit is necessary to ensure the proper and uniform resolution of two important questions regarding the standard for Summary Judgment and liability of corporate debt.

I. Whether The Sixth Circuit Failed To Apply The Appropriate Standard For Summary Judgment.

The Sixth Circuit Opinion gives passing reference to the high standard for Summary Judgment recognized *Seamon v. Snow,* 206 F.3d 1021(10th Cir. 2000) Close examination of the evidence in the depositions makes it clear that there are genuine issues of material facts that preclude the Motion for Summary Judgment propounded in this action. Contrary to the authority cited by the Sixth Circuit, the use of Summary Judgment, shows the Court did not use the high standard required under the substantive law of the Commonwealth of Kentucky. *Steelvest, Inc. v. Scan Steel Service Center, Inc.*, Ky., 807 S.W.2d 476 (1991). As always, the Court must consider the facts and evidence in a light most favorable to the non-moving party. The non-moving party can defeat the Motion for Summary Judgment by presenting "at least some affirmative evidence showing there is a genuine issue of material fact for trial." *Ward v. Commonwealth*, NRECP, Ky. App., 841 S.W.2d 589, 590-591 (1991). Summary

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Judgment should only be granted against the responding party it would be impossible to produce evidence at trial warranting judgment in his or her favor. *James Graham Brown Foundation, Inc., v. St. Paul Fire and Marine Insurance Co.*, Ky., 814 S.W.2d 273 (1991). As cited above, Summary Judgment is inappropriate when it hinges on an issue that delves into a Party's state of mind. *Seamons v. Snow*, supra at 1027-1028; *Slip Opinion, 2005 WL 430328*, at page 4.

The only way this Court can grant Summary Judgment as asked by the Defendant is if all the pleadings and all the relevant discovery indicated an absence of genuine issues of material facts. *Palmer v. Int'l Assoc. of Machinists and AeroSpace Workers, ALFL-CIO*, Ky., 882 S.W.2d 117 (1994). However, a review of the facts in the Sixth Circuit Opinion, and the facts above shows a misapplication of the substantive law and the law of the 10th Circuit cited, to justify a low standard of Summary Judgment. There were hotly debated facts that must be decided by a jury.

With this high standard in mind, this Supreme Court must invoke its supervisory power to stop abuse of Summary Judgment to dispose of civil cases where there are genuine controversies over material facts like "delving into a party's state of mind." *Slip Opinion*, supra at 4. The Sixth Circuit refused to correct a too low a standard under the controlling substantive law of Kentucky. Judges are disposing of civil cases this way instead of litigation, proof development and even trial by Jury. This case was disposed with only the depositions of the parties, and settlement discussions. No evidence of third parties were allowed before Summary Judgment was argued.

This Petition for Writ of Certiorari should be granted in order for this Court to speak on the overuse of Summary Judgment and whether the Kentucky Standard and the Tenth Circuit standard should be the appropriate standard applied.

II. Whether The Sixth Circuit Opinion Reversing The District Court On Liability Of Michael Paul For Corporate Debt Was An Application Of Conflicting Authority Around The Country And Between Circuits Which This Court Can Decide The Controlling Position.

The Sixth Circuit Opinion admits Kentucky law has not spoken on the facts of this case. *Slip Opinion,* supra at 5. The Court refers to ancient Kentucky cases that do not speak to the case here. *Ibid.*

This Supreme Court should grant this Petition to choose the appropriate path. The Sixth Circuit cites one New York case. However, the Sixth Circuit ignores *Department 56, Inc., v. Bloom,* 186 Misc.2d 901, 720 N.Y.S.2d 920 (2001) a case with the opposite result. The Sixth Circuit also did not follow this Court's theory in *Raleigh v. Illinois Depart. Of Revenue,* 530 U.S. 15, 147 L.Ed.2d 13; 120 S.Ct 1951 (2000). This Court ruled that the applicable substantive state law governs the burden of proof on a tax lien. The Sixth Circuit ruling is to the Contrary.

First, Michael w. Paul, Sr. was not individually responsible for the debt contained in the Promissory Note. The District Court was correct concluding Michael was not personally liable

because he signed only as President of a valid Delstar Nevada, and a valid Delta GA. Only Delstar KY was an empty shell, but still it was still a valid Kentucky Corporation until November 3, 1997. *See, Simpson v. Haath & Company,* Ky.,580 S.W.2d 505 (1979); R 110, 11/21/2003, p.12, Apx.___) the District Court correctly explained that an officer (President Michael W. Paul, Sr.) will not be individually bound when he contracts within the scope of his authority as agent for the corporation. Especially when the agent and officer bring to the attention of the lender the empty shell of Delstar KY. (Depo. Lester Paul Vol. I, pgs. 25- 38, Apx.___; Depo. Michael Paul pgs. 10-20 and 26-28).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 03-6655, 04-5058

[Filed February 23, 2005]

ERIN MESSING, as executrix of the estate of Andrew Messing,	)	
	)	ON APPEAL
	)	FROM THE
Plaintiff-Appellee/Cross-Appellant	)	UNITED STATES DISTRICT
	)	COURT
v.	)	FOR THE
	)	EASTERN
C. LESTER PAUL, et al.,	)	DISTRICT
	)	OF
Defendants-Appellants/Cross-Appellees	)	KENTUCKY
	)	

Before: NELSON and SUTTON, Circuit Judges; WELLS, District Judge[1]

[1] The Honorable Lesley Wells, United States District Judge for the Northern District of Ohio, sitting by designation.

SUTTON, Circuit Judge. Over the course of several years, Andrew Messing agrees to lend $600,000 to myriad oil-and-gas ventures owned by Lester Paul and his family (collectively, "the Pauls"). After the Pauls failed to pay him, Messing bought (and after his death in February of 2001, Erin Messing, his wife and executrix of his estate, continued) this lawsuit to recover the $600,000. In turn, the Pauls sought to hold Messing liable for an alleged breach of a stock-option agreement and for damages allegedly resulting from their investments in and work for a Florida partnership named Gasbusters, Inc. The district court held that Messing could recover the $600,000 loan, that the stock-option agreement never ripened and that the Pauls could not recover any damages Gasbusters owed them from Messing, who, as a limited partner in the company, was not directly liable for its debts. We agree with the district court's order in all respects but one – we agree with Messing that Michael Paul, Lester Paul's son, is personally liable under the relevant agreements for signing them as the president of a dissolved corporation.

I.

Lester and Margaret Paul and their sons, Michael and Timothy Paul, own several Kentucky oil-and-gas businesses. Among their corporations and their assumed business names are T & P Enterprises, Delstar Resources (a Nevada corporation), Delstar Resources (a Kentucky corporation), The Viking Group, Bluegrass Drilling Corporation and Delta Gas Corporation (collectively, "the Paul entities"). Some of these companies, on the

Pauls' own admission, had been dissolved at all times relevant to this appeal, *see* JA 77 (admitting that Delstar Resources (Kentucky) was administratively dissolved on November 3, 1997, and that Bluegrass Drilling Corporation was dissolved on November 1, 1994), and others have never existed at all as independent entities, *see* JA 78 (admitting that The Viking Group "is an assumed name").

On November 25, 1997, Lester Paul, acting as a "spokesperson" for the Paul entities, negotiated a $500,000 loan from Andrew Messing that would become due along with interest on November 30, 1998, in one balloon payment. In exchange, the Pauls gave Messing a promissory note and an agreement pledging all of the stock in their corporations as security for Messing's loan. Lester and Margaret Paul singed these agreements in their corporate and individual capacities, and Michael Paul signed them in his capacity as president of the then-non-existent corporation, Delstar Resources (Kentucky). Over the next year and a half, Messing agreed to increase the value of the loan by an additional $100,000 in exchange for two additional promissory notes and a mortgage on Paul-held real estate.

Also on November 25, 1997, as part of the same transaction, Messing entered into a stock-option agreement with the Pauls that allowed him to convert his loan to the Pauls into a one-half equity interest in the Paul entities. Under the agreement, Messing had an option to purchase fifty percent of the "stock" of Delstar Resources (Nevada), Delstar Resources (Kentucky), Bluegrass Drilling, Delta Gas and The

Viking Group for $500,000. "[I]n the event that [Messing] elect[ed] to exercise his option to purchase and pay for the shares," the agreement provided, his "obligations...[were] subject to the satisfaction of" several conditions. JA 370. The Pauls, for example, agreed to "perform[] and compl[y] with all covenants, conditions, and obligations required by this agreement to be performed or complied with prior to or on the closing." JA 370. And they represented and warrantied that the corporations were "duly organized, validly existing, and in good standing under the laws of the Commonwealth of Kentucky or the State of Georgia respectively" – a representation that the Pauls now concede to have been false. JA 367. The contract established a deadline of May 31, 1998, for Messing to decide whether to convert his previous loan into a capital contribution. If Messing chose to go through with the conversion, the agreement "contemplated" that a "closing...shall take place at the offices of" a Kentucky law firm on a date set by Messing "within 20 business days after the exercise...of the option to purchase the shares and satisfaction or waiver of all of the conditions." JA 367.

On May 21, 1998, Messing's attorney notified Lester Paul that Messing intended to exercise his rights under the stock-option agreement to become a one-half owner of the Paul entities. But because the dates suggested by Messing's attorney conflicted with Lester Paul's schedule, the parties never met for the "closing" that the stock-option agreement contemplated. Paul repeatedly extended the deadline for scheduling a closing but the deal was never consummated. And in November of 1999, Messing

indicated that he did not wish to close on the stock-option agreement.

Over roughly the same period of time as these events, the Pauls began to invest in and work for a Florida limited partnership named Gasbusters, in which Messing was a partner. One of the Paul entities, Delstar Resources (the Nevada version), acquired from Delstar (Kentucky) in May of 2000 the title to land containing oil-and-gas minerals that Gasbusters leased in exchange for certain royalties, which the Pauls now claim they never received. In addition, another Paul Entity, Bluegrass, performed various services operating wells owned by Gasbusters in February of 1996. And lastly, Delta, a third Paul entity, owns a mortgage on certain gas wells owned by Gasbusters.

After a falling out among some of the investors, Messing, through a company named FL-Gasbusters, Inc., became the effective leader of Gasbusters in 1996. At some point after that, Messing discovered that Gasbusters' certificate of limited partnership had not been filed with the Florida Department of State and, to cure this deficiency, filed an affidavit and certificate of limited partnership that was accepted by the Department on March 11, 1997. On April 1,1997, the Kentucky Secretary of State issued Gasbusters a certificate of authority.

On September 20, 2000, Messing brought this diversity action in federal court seeking enforcement of his loan agreement with the Pauls. The district court granted summary judgment for Messing on

September 15, 2003, and entered an amended order on November 21, 2003. The district court concluded that the Pauls were in "clear breach of the conditions of closing" the stock-option agreement because the corporations either "never existed at any time during [the] negotiations" or had been administratively dissolved by the Kentucky Secretary of State. D. Ct. Op. of Sept. 16, 2003; JA 123-24. After the district court's initial judgment, Messing filed a motion to specify the liability amount and the defendant. In response, the district court decided that Michael and Timothy Paul cold not "be held personally liable for the debts of the Paul entities" because "Timothy Paul never signed any of the loan documents, and Michael Paul only signed in his official capacity as President of various Paul entities." D. Ct. Op. of Nov. 18, 2003, at 12.

II.

This appeal presents three issues: (1) whether Messing breached or closed on the stock-option agreement that he signed at the same time as the loan; (2) whether the Pauls may assert counterclaims against Messing stemming from losses sustained in their dealings with Gasbusters; and (3) whether Michael and Timothy Paul may be held personally liable for Messing's damages.

A.

The Pauls first argue that Messing's recover on the loan should be set off by his liability under the stock-option agreement. They concede that Messing never closed on the stock-option agreement and that

they misrepresented their corporations' status during the relevant period. Nonetheless, once Messing announced an interest in exercising his option, they claim that he was responsible for establishing a formal "closing" and breached the agreement by "delaying the closing or refusing to close the agreement." JA 124.

The express terms of the stock-option agreement contradict the Pauls' argument. The agreement conditions Messing's obligation to close the transaction, even once he "elects to exercise his option to purchase and pay for the shares," on the Pauls' "perform[ance] and compl[iance] with all covenants, conditions, and obligations required by this agreement to be performed or complied with prior to or on the closing." JA 370. And at least twice in the agreement the Pauls represented that their corporations were "duly organized, validly existing, and in good standing." JA 367; JA 368 ("No representation or warranty of optionor herein...contains or will contain any untrue statement of a material fact or omits or will omit to state a material fact necessary to make the statement contained herein...misleading."). In light of their concession that these representations were false, the Pauls did not live up to their obligations "prior to...closing," thus absolving Messing of his duty (if any) to set a closing date once he expressed interest in purchasing the shares.

The Pauls' sole response is to rely on one part of the agreement that requires their contractual "representations and warranties...[to] be true and correct on and as of the closing." JA 370. According

to the Pauls, this contractual obligation permitted them to misrepresent and fabricate at will *prior to* the closing, so long as their corporations were validly organized *at* the closing. But in focusing on the one provision that required their representations and warranties to be true at the time of the closing, the Pauls slight the other provisions that required them to be truthful prior to the closing. Under those provisions, the Pauls had failed to comply with the agreement's "covenants, conditions, and obligations" and Messing was thus under no requirement to close the transaction.

B.

The Pauls next argue that Messing is liable for any amounts owed them by Gasbusters because the Pauls believed that he was a general partner of the company during the relevant period. Under applicable state law:

> [A] person who makes a contribution to a business enterprise and erroneously but in good faith believes that she or he has become a limited partner in the enterprise is...liable as a general partner to any third party who transacts business with the enterprise before the person withdraws and an appropriate certificate is filed to show withdrawal or before an appropriate certificate is filed to show that the person is not a general partner, but in either case only if the third party actually believed in good faith that the

> person was a general partner at the time of the transaction.

Fla. Stat. § 620.132; Ky. Rev. Stat. § 362.495 (stating that, under Kentucky law, "the laws of the state under which a foreign limited partnership is organized shall govern its organization and internal affairs and the liability of its limited partners").

In this case, as an initial matter, the business relationship between the Pauls and messing did not begin until 1997, *see* JA 186 (Lester Paul testifying that "I didn't trade with Andy [Messing] until '97."), leaving only two months (before Messing filed a certificate to cure the deficiency in Gasbusters' partnership status on March 11) during which the Pauls conceivably could not have believed in good faith that Messing was a general partner of the firm. One of the Pauls' counterclaims against Gasbusters stems from alleged injuries suffered before 1997, which makes it difficult to credit the Pauls' assertions that they believed at the time of the transaction that Messing could be held liable for those debts. *See* JA 85 (requesting damages for services performed in 1996). A second counterclaim requests damages resulting from a lease that Delstar (Nevada), on the Pauls' own accounting, obtained in May 2000 (admittedly from another Paul corporation, Delstar (Kentucky), but the Pauls do not allege any pre-2000 damages) – which was over three years after Messing cured any deficiency in the Gasbusters charter. *See* JA 84. And the final counterclaim, while it conceivably could have produced damages during the two relevant months in 1997, arose out of a mortgage assigned to a Paul corporation, Delta, on September

16, 1980, well before Lester Paul testified he "trade[d]" with Messing. *See* JA 86.

Making matters worse, Lester Paul's deposition testimony directly contradicts the Pauls' assertions that they believed in good faith that Messing was a Gasbuster general partner and could be held personally liable for the partnership's debts. Responding to a question asking whether he had "any evidence that Andy Messing and the other limited partners did not intend to be a limited partnership when they joined together in Gasbusters," Paul stated, "Certainly not. I think they intended to. I agree with that." JA 306. Paul, moreover, agreed that he "understood at all times...that the general partner [in Gasbusters] was a corporation out of Florida called Florida Gasbusters," an answer implying that he understood Messing's role in the company. *Id.* And when asked whether he "had a belief that [Messing] individually was the general partner of Gasbusters," Paul responded, "No. He spoke for them." *Id.*

Under normal circumstances, the Pauls are correct, summary judgment is inappropriate when it hinges on an issue delving into a party's state of mind. *See* Paul Br. At 17 (citing *Seamons v. Snow*, 206 F.3d 1021, 1027-28 (10th Cir. 2000)). In these circumstances, however – with a timeline that simply does not add up, testimony that contradicts assertions of good-faith belief and a total lack of documentary proof of damages – a rational jury could not conclude that the Pauls believed in good faith that Messing was a "general partner *at the time* of the transaction." (Emphasis added.) The district court correctly granted summary judgment on this record. *See, e.g.,*

Commonwealth v. R.J. Corman R.R. Co., 116 S.W.3d 488, 498 (Ky. 2003) (noting that, once one party meets its burden, the other party "in order to avoid summary judgment" must "offer at least some affirmative evidence demonstrating the existence of a genuine issue of material fact for trial").

C.

Lastly, Messing cross-appeals the district court's decision in its amended order to dismiss Michael and Timothy Paul as individual defendants.

We agree with Messing that Michael Paul's signature of the relevant contracts and promissory notes as president of Delstar Resources (Kentucky), a concededly non-existent corporation at the time, makes him personally liable under Kentucky law. Kentucky law provides that officers, directors or shareholders of dissolved corporations who continue to operate the business following dissolution (beyond the necessity of winding down the corporation's affairs) are individually liable for any debts that they incur. *See, e.g., Oliver v. Wyatt*, 418 S.W.2d 403, 406 (Ky. 1967) ("If the agent is merely purporting to be acting for a principal but is in fact acting for himself, he will be personally liable on the contract."); *Steele v. Stanley*, 35 S.W.2d 867, 868 (Ky.1931); *Huber v. House*, 2004 U.S. Dist. LEXIS 26718, at *24 (S.D. Ind. Dec. 7, 2004) ("[U]nder Kentucky law, an agent may be held personally liable on a contract made where the contract exceeded the scope of the agent's authority."); *see also Annicet Assocs., Inc. v. Rapid Access Consulting, Inc.*, 656 N.Y.S.2d 152, 154 (N.Y. Sup. Ct. 1997) (stating that the "prevailing view

among [] jurisdictions" is that officers that carry on the business of a dissolved corporation "may be held personally liable for debts incurred by the continuation of business").

Timothy Paul, by contrast, did not sign any of these agreements himself and, besides maintaining a position as an officer in some of the Pauls' fictitious corporations, was only peripherally, if at all, involved in the Pauls' dealings with Messing. Although Kentucky has not taken a position on the liability of a corporate officer in these precise circumstances, *cf. In re Young*, 2004 Bankr. LEXIS 736, at *4-7 (E.D. Ky. Apr. 27, 2004) (summarizing Kentucky law), other jurisdictions require active participation by the officer in incurring the debts before an imposition of personal liability, *see, e.g., United States Fid. & Guar. Corp. v. Putzy*, 613 F. Supp. 594 (N.D. Ill. 1985); *Columbia Real Estate Title Ins. Co. v. Columbia Title Agency, Inc.*, 11 Ohio App. 3d 284, 286 (Ohio Ct. App. 1983). Messing, moreover, has cited no authority that squarely addresses whether an individual in Timothy Paul's position may be held liable for corporate debt. Based on our reading of the Kentucky Supreme court's opinions in *Oliver* and *Steele* and based on our reading of the particular record before us today, we are unwilling to extend Kentucky law to individuals like Timothy Paul who, while officers in dissolved corporations, appear not to have been aware of any of the underlying transactions that created the debt. *See* JA 337-50.

The Pauls' assertion that Messing has waived this argument is unavailing. Messing's complaint

includes both Michael and Timothy Paul as individual defendants. And Messing's memorandum in support of summary judgment argued that Michael and Timothy Paul were personally liable on the debt for acting "on behalf of dissolved corporations." JA 226.

III.

For these reasons, we affirm the judgment of the district court in all respects save for the liability of Michael Paul under the agreements.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 03-6655, 04-5058

[Filed JUL 29, 2005
Leonard Green, Clerk]

ERIN MESSING, as executrix of the estate of Andrew Messing,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY
Plaintiff-Appellee/Cross-Appellant	)	
v.	)	
C. LESTER PAUL, et al.,	)	
Defendants-Appellants/ Cross-Appellees	)	

ORDER ON PETITION FOR REHEARING

Before: NELSON and SUTTON, Circuit Judges; WELLS, District Judge.[2]

[2] The Honorable Lesley Wells, United States District Judge for the Northern District of Ohio, sitting by designation.

Upon consideration of the "tendered" motion for extension of time to file petition for rehearing as timely,

And further considering the "tendered" motion to recall the mandate,

It is **ORDERED** that the motion for extension of time be and it hereby is **GRANTED.**

It is further ORDERED that the mandate be recalled for the limited purpose of filing the petition for rehearing,

It is **ORDERED** that the petition for rehearing be and it hereby is **DENIED.**

ENTERED BY ORDER OF THE COURT
"s/Leonard Green, Clerk"

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

No. 00-168-HRW

[Eastern District of Kentucky
Filed November 21, 2003
At Ashland
Leslie G. Whitmer
Clerk, U.S. District Court]

ERIN MESSING, as executrix of the estate of Andrew Messing,

Plaintiff

v.

C. LESTER PAUL, et al.,

Defendants

ORDER

This matter is before the Court upon the Plaintiff's motion is before the Court upon the Plaintiff's motion to alter or amend the court's September 15,2 003 judgment [Record No. 103]. As provided for below, the Court will sustain in part and overrule in part the Plaintiff's motion.

The Plaintiff's motion contains six specific arguments. The Plaintiff first argues the Court should, consistent with its previous ruling, state a sum certain due the Plaintiff. The Plaintiff notes she does not disagree with the Court's analysis and subsequent ruling. However, the Plaintiff states the Court's judgment lacks the specific dollar amount to make the judgment enforceable. The Plaintiff proposes the correct amount is:

> The principal sum of Six Hundred Thousand Dollars ($600,000), plus prejudgment interest in the amount of Two Hundred Seventeen Thousand Two Hundred Forty-Four Dollars and Forty-Two Cents ($217,244.42) to July 7, 2001, and $166.70 per day from July 7,2001 until date of this judgment.

She contends if the Court does not include this specific information, enforcement of the judgment will be difficult, if not impossible.

The Plaintiff next asks the court to amend the judgment to "clearly identify the valid loan documents." The Plaintiff requests the court to add the following language, based upon the terminology of her Complaint:

> The Loan Agreement, the First Note, the Second Note, the Third Note, the Stock Pledge Agreement and the Mortgage as defined in the Complaint (Doc. No. 1) are all valid and enforceable against the Paul Defendants, and the Paul Defendants are in default of their obligations thereunder.

The Plaintiff maintains the addition of this language is needed in the amended judgment for the sake of clarity and finality.

Plaintiff Messing also argues the judgment should be clearly amended to identify which Defendants are liable to the Plaintiff. She contends this amendment is necessary for finality of judgment because of the "shell game" played by the Defendants "with their various names, properties and alleged entities." The Plaintiff suggests the following language be used to amend the judgment:

> Plaintiff, Erin Messing, as Executrix of the Estate of Andrew Messing, is awarded judgment against the Defendants, C. Lester Paul, individually and d/b/a T & P Enterprises, Inc., Delstar Resources, Inc., The Viking Group, Inc., and Bluegrass Drilling Corporation; Margaret S. Paul, individually and d/b/a T & P Enterprises, Inc., Delstar Resources, Inc., The Viking Group, Inc., and Bluegrass Drilling

> Corporation; Michael W. Paul, Sr., individually and d/b/a Delstar Resources, Inc., and T & P Enterprises, Inc.; Timothy C. Paul, individually and d/b/a Delstar Resources, Inc.; Delstar Resources, Inc., a Nevada corporation; Delstar Resources, Inc., a Kentucky corporation; T & P Enterprises, Inc., a Kentucky corporation; Bluegrass Drilling Corporation, Inc., a Kentucky corporation; Delta Gas Corporation, a Georgia corporation; and The Viking Group, Inc., a Georgia corporation (collectively the "Paul Defendants"); jointly and severally, in the principal sum of...

Additionally, Plaintiff contends she is entitled to an award of reasonable attorney's fees and costs incurred. Plaintiff Messing contends the subject loan documents "expressly provide that Plaintiff may recover her reasonable attorney's fees and costs of collection from the Paul Defendants." The Plaintiff maintains the amount of attorney's fees and costs is Seventy-Three Thousand Three Hundred Thirty-Five Dollars and Thirty-Five Cents ($73,335.35). This figure is based on the supporting affidavits of Dora Fowler and C. Timothy Cone, respectively the bookkeeper and a member of Gess Mattingtly and Atchison, P.S.C., the law firm employed by the Plaintiff.

The Plaintiff next contends the Court's decision to obstain from deciding the remaining

claims, due to the pending Lawrence County Kentucky Circuit Court case of Hiroc Programs, Inc., et al v. Wilhemina Cullen Robertson, et al, (the Hiroc case), was improper. Plaintiff Messing alleges the Hiroc case is not a parallel proceeding because, "none of the Plaintiff's Cadle's or the Paul Defendants' claims asserted in this federal action are in issue in the Hiroc Case."

Plaintiff Messing, in furtherance of her argument against abstention, asserts that based on "general abstention principles," the Court's decision to abstain was incorrect. The Plaintiff concedes, "[a] district court may be justified in abstaining from exercising jurisdiction under the principles articulated in Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976), in deference to a concurrent, parallel state court proceeding." However, the Plaintiff maintains "this form of abstention is available in only very exceptional circumstances," which, she states, are not present in this case.

The Plaintiff argues that as a threshold issue before applying the Colorado River doctrine, "the district court must first determine that the concurrent state and federal actions are actually parallel." The Plaintiff states "the district court must compare the issues in the federal case to the issues actually raised in the state court action, not those that might have been raised." However, the Plaintiff is forced to conceded that if in the Defendant's in the Hiroc Case "are finally successful in obtaining a final and enforceable, money judgment against the Hiroc Pauls and Delstar Nevada, as surety on the Bond, they must

still join all parties with an interest in the property." The Plaintiff contends that this potential joinder in the Hiroc Case is irrelevant, and the Court must only "look at the nature of the state action as it presently exists."

Plaintiff Messing further argues even if the Hiroc Case and this case are parallel proceedings, application of the eight factor balancing test found in Paine Webber, Inc. v. Cohen, 276 F.3d 197, 205 (6th Cir. 2001), necessitates that the Court retain jurisdiction. As the Plaintiff correctly states, that in determining whether to abstain the Sixth Circuit requires the district court to evaluate the following eight factors:

> (1) whether the state court has assumed jurisdiction over any res or property; (2) whether the federal forum is less convenient to the parties; (3) avoidance of piecemeal litigation;...(4) the order in which jurisdiction was obtained...(5) whether the source of governing law is state or federal; (6) the adequacy of the state-court action to protect the federal plaintiff's rights; (7) the relative progress of the sate and federal proceedings; and (8) the presence or absence of concurrent jurisdiction. *Id.*

As the Plaintiff also correctly notes, these factors are weighed in favor of exercising jurisdiction.

The Plaintiff alleges seven of the eight aforementioned factors counsel in favor of retaining jurisdiction. First, she contends that the state court has not taken jurisdiction over any of the property since the Hiroc Case is an action for money damages. Plaintiff Messing maintains this Court has retained jurisdiction of the res in question through the foreclosure proceeding. Next, the Plaintiff contends the convenience of the forum is neutral, since the Lawrence Circuit Courthouse is less than one hundred miles from the Federal Courthouse in Ashland. The Plaintiff states "convenience to the parties, the witnesses and counsel is the same."

The Plaintiff also alleges that avoidance of piecemeal litigation requires this Court to retain jurisdiction. She reiterates her arguments that this Court should retain jurisdiction over the remaining claims because "Plaintiff, Cadle and several of the Paul Defendants are not parties to the Hiroc case." Plaintiff also argues that this Court's jurisdiction is proper because, "the Hiroc Case does not involve any of the claims relating to the subject loan documents," which are at issue in the present federal case.

Additionally, Plaintiff Messing contends the remaining claims should stay in federal court in the interest of judicial economy. She maintains the federal litigation has progressed further than the state litigation in the Hiroc Case, and "[m]any more parties with an interest in the property are before this Court than are before the Lawrence Circuit Court." The Plaintiff also argues "the Lawrence Circuit Court is a completely inadequate forum for the Plaintiff's claims," because the "Plaintiff is not a party to the

state court proceeding," and none of the claims at issue in the federal case are at issue in the state case.

The Plaintiff concedes "the adjudication of the relevant claims of the parties are governed by state law." However, the Plaintiff argues that this factor alone is not sufficient for the Court to relinquish jurisdiction over the remaining claims. Plaintiff Messing contends if the Court balances "all of these factors as they relate to the facts herein, it is clear that abstention is inapplicable here."

The Plaintiff's next argument is that based on the Younger Doctrine abstention is improper. Plaintiff correctly states that the Younger Doctrine requires federal courts to abstain when there are pending state proceedings involving an important state interest, and the state proceedings afford the plaintiff an adequate opportunity to raise his constitutional claims. *See* Younger v. Harris, 401 U.S. 37 (1971). The Plaintiff reiterates her argument "[t]here is no pending state court proceeding involving Plaintiff, the other parties and the same claims." Plaintiff Messing concludes, therefore, "it is not possible for Plaintiff to raise his claims, constitutional or otherwise, in the lower court proceeding." Plaintiff Messing also argues "the claims in the Hiroc Case and the instant case are not at all similar." However, since both the instant case and the Hiroc Case involve breach of contract claims between private parties, "[t]here simply is no important state interest at stake" that requires this Court to abstain.

Finally, Plaintiff Messing argues Burford abstention is improper. As the Plaintiff notes, the need for Burford abstention arises when a case presents "difficult question of state law bearing on policy problems of substantial public import whose importance transcends the results in the case then at bar." Colorado River, 96 S.Ct. at 1244, discussing Burford v. Sun Oil Co., 319 U.S. 315 (1943). The Plaintiff continues, Burford abstention "balances the strong federal interest in adjudicating certain classes of cases and rights in federal court versus states' interests in maintaining uniformity in treatment of essentially local problems and retaining local control over difficult state law issues." The Plaintiff argues since this case is a "simple" breach of counter claim, Burford abstention is not appropriate because there are "no difficult question[s] of state law bearing on larger policy problems with significance to the public at large which are involved in this case."

The Plaintiff's sixth argument is that based on Federal Rule of Civil Procedure 15, the Court should permit her to file a supplemental complaint joining as parties Robert D. Hall, Heritage Properties, Inc., and blue Flame Energy Corporation. The Plaintiff alleges joining these parties is necessary because the proposed Defendants "appear from the public records to be claiming an interest in the Oil and Gas Minerals...at issue in this case." She also maintains that "Kentucky law requires these persons all be joined to this foreclosure action."

Plaintiff Messing states the proposed Defendants "recorded instruments in the Lawrence County Clerk's Office... appearing to be junior to the

Plaintiff's Mortgage or otherwise encumber the property constituting the Oil and Gas Minerals at issue in this case." She maintains that since those instruments were recorded after the Plaintiff's July 1997 Mortgage, "all of the Proposed Defendants were on constructive notice of Plaintiff's prior Mortgage against the property." Plaintiff alleges "[n]one of these conveyances were known to [her] at the time of the commencement of this case," and she "only recently learned of their existence when updating her examination of the title to property." Plaintiff asserts that based on these reasons she should be permitted to file an amended complaint joining the proposed Defendants under Federal Rule of Civil Procedure 15.

The Paul Defendants first respond to the Plaintiff's argument against abstention. The Defendants state that the Court's decision to abstain was proper for several reasons. First, the Defendants note "[t]he Messing estate claims an interest in the property that was pledged as security for a supercedeas bond in [the] state court action." They also correctly state that "Plaintiff Messing concedes the Messing estate will have to be joined as a party in the Lawrence Circuit Court in order to adjudicate the priority of the competing claims upon the property and award complete relief." They correctly conclude "state court adjudication will necessarily require a ruling upon the effect and enforceability of the subordination agreement executed by Plaintiff Messing's decedent." The Defendants maintain, therefore, "Kentucky's state courts are the proper forum for the adjudication of the issues pertaining to title and deposition of Kentucky property, especially when that property has already been accepted by the

Lawrence Circuit Court as security for a supercedeas bond." The Defendants argue that if this Court ruled upon the effect and validity of the subordination agreement, "the Court's ruling might adversely affect the rights of the parties who are currently before the Lawrence Circuit Court in the Hiroc litigation."

The Defendants also argue abstention was proper because the issues raised in federal court were inextricably intertwined with claims asserted in state court proceedings. The Defendants reassert that the Lawrence Circuit Court has taken an interest in the property by accepting it as security for a supercedeas bond in the state Hiroc case. The Defendants also restate that the Messing estate "will have to be joined as a defendant in the Hiroc litigation in order to grant relief if the Plaintiffs in that case prevail." Therefore, the Defendants conclude "the Defendants' title to the property that is subject of the subordination agreement, and the validity of the subordination agreement itself, are disputed issues that are inextricably intertwined with the issues that have already been considered by the Lawrence Circuit Court."

The Paul Defendants next argue the Plaintiff's motion to join new parties and file an amended complaint is untimely. The Defendants maintain the Plaintiff's justification, that she did not discover the "publicly recorded interests of these new parties" until nearly three years after this case began, is not sufficient to warrant granting the Plaintiff's motion for a supplemental complaint. The Defendant alleges "[e]ight of the nine recorded instruments listed...were

filed before the Plaintiff filed the complaint that initiated this litigation.

The Defendants third argument is that the Plaintiff's proposed judgment improperly imposes liability upon individual Defendants, Michael Paul and Timothy Paul. The Defendants maintain neither Michael Paul nor Timothy Paul signed any documents "upon which the Plaintiff relies as a basis for its claim in this case."

The Defendants fourth and final argument is that the affidavits filed in support of the Plaintiff's motion for attorneys fees are inadequate because the affidavits "do not disclose the nature of the legal services and expenses for which the Plaintiff now seeks reimbursement." The Defendants contend that it "is impossible to determine whether [the services rendered] were performed by attorneys, paralegals, or law clerks," and thus the Court can not determine "whether those services and expenses were reasonable."

On October 30, 2003 the Plaintiff filed her Reply [Record No. 109]. In the Reply, the Plaintiff reiterates her arguments that the Court's decision to abstain was improper, the Plaintiff's Motion for Supplemental Complaint should be granted, Michael and Timothy Paul should be held individually liable, and the Plaintiff's are entitled to attorneys fees.

After reviewing the records, the Court agrees with several of the Plaintiff's arguments. As an initial matter, the Court agrees to specify which "loan documents" are enforceable. The loan documents

subject to enforcement include: (1) the Loan Agreement, dated November 25, 1997, in which Mr. Messing agreed to loan the Defendants $500,000. The entire loan amount, principal and interest was due on November 30, 1998; (2) the Stock Pledge Agreement, dated November 25, 1997, in which the Defendants pledged all the stock in the companies, Delstar Nevada, Delstar Kentucky, Bluegrass, Delta, and Viking, as collateral for the Loan Agreement; (3) and the First Note, dated November 25, 1997, in which the Paul Defendants promised to pay $500,000 plus interest at 10.5%.[3] In their response, the Defendants make no objection regarding the Plaintiff's request. Further, in deposition testimony, Defendant C. Lester Paul identifies the aforementioned documents as the operative loan documents. (Deposition of C. Lester Paul, p. 201-203).

The Plaintiff also correctly asserts that the judgment should state a sum certain of $600,000 to the Plaintiff. In their response, the Defendants do not dispute this amount. According to the Loan Agreement, the initial loan amount was for $500,000. However, during the course of Mr. Messing's business relationship with the Paul Defendants, the amount of the loan was increased to $600,000. The Court notes that in his deposition, Defendant C. Lester Paul does not dispute that Mr. Messing gave $600,000 to the Paul Defendants. (Deposition of C. Lester Paul, p. 213-215). Instead, Mr. Paul argued,

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[3] As discussed more fully below, the Court, based on principles of comity between state and federal courts, abstains from deciding on the validity of the mortgage and subsequent subordination agreement.

per the Stock Pledge Agreement, the $600,00 loan was converted into a capital contribution for the purchase one-half (1/2) of the stock in Delstar Nevada, Delstar Kentucky, Bluegrass, Delta, and Viking Group, Inc. It is undisputed that Mr. Messing intended to exercise his rights under the Stock Pledge Agreement. However, as the Plaintiff notes, there is no indication Mr. Messing consummated the Stock Pledge Agreement, or forgave the $600,000 debt. Further, the Defendants made no attempt to pay back the $600,000. (Deposition of C. Lester Paul, p. 228).

Plaintiff Messing also requests the Court award prejudgment interest. This request is provided for in the Promissory Note accompanying the Loan Agreement. The Note states, "The principal of this note (the "Note") shall bear interest on the unpaid balance thereof at a rate per annum of 10.5%." (Plaintiff's Exhibit B, Plaintiff's Motion for Summary Judgment, Record No. 61). Plaintiff Messing contends the correct amount is $217,244.42 for the period ending on July 7, 2001, and $166.70 per day from July 7, 2001 until the judgment is rendered. The Defendants did not respond to the Plaintiff's argument for prejudgment interest, or dispute that the Plaintiff's amount was not correct. Accordingly, the Court grants the Plaintiff's request for prejudgment interest.

The Plaintiff next argues that the estate is entitled to attorneys fees. The Plaintiff states 478.8 hours of legal services have been billed to this case by attorneys, law clerks, and paralegals, resulting in a total time value of $66,081.50. The Plaintiff also states $7,253.85 has been spent in litigation related

expenses, such as travel, copies, long distance telephone calls, and filing fees. Therefore, Plaintiff Messing contends $73,335.35 is a reasonable award. The Defendants do not dispute that attorneys fees are appropriate. In fact, the Promissory Note accompanying the Loan Agreement provides for payment of attorneys fees. The Note states, in part:

> If there is any default under this note, and this note is placed in the hands of an attorney for collection,...makers [the Pauls] promise to pay the holder hereof its reasonable attorneys fees and court costs incurred in collecting or attempting to collect or securing or attempting to secure this note... (Plaintiff's Exhibit B, p.4, Plaintiff's Motion for Summary Judgment, Record No. 61).

However, the Defendants allege that it is impossible to determine how the time was billed, by whom, and at what rate.

The Court agrees with the Plaintiff that an award of reasonable attorneys fees is appropriate in this case. According to KRS 411.195, "Any provisions in writing which create a debt,...requiring the debtor...to pay reasonable attorneys fees...in the event of default, shall be enforceable." As the Court previously noted, the subject loan documents executed by the Defendants provide for attorneys fees to be paid if the Defendant Pauls default. Further, the Court feels that Plaintiff's request of $73,335.35 is reasonable based on the protracted length of the

litigation, and the amount of time spent by the Plaintiff's law firm in preparing this case.

The Plaintiff also requests the Court to specify the parties that are liable for the judgment. The Defendants object to the Plaintiff's proposed language, stating it improperly names Michael W. Paul, Sr., and Timothy C. Paul in their individual capacities. The Defendant correctly notes that Timothy Paul never signed any of the loan documents, and Michael Paul only signed in his official capacity as President of various Paul entities. The Court agrees with the Defendant that Michael Paul and Timothy Paul cannot be held personally liable for the debts of the Paul entities when they did not affirmatively accept any binging obligation. (*See* Simpson v. Heath & Company, 580 S.W.2d 505 (Ky. 1979), stating "[i]t is fundamental that an officer of a corporation will not be individually bound when he contracts within the scope of his authority as an agent for the corporation.").

The Court also agrees with the Defendant that Plaintiff Messing's motion to file a supplemental complaint and joining three new parties is untimely. The Plaintiff's argument that she did not know of the conveyances made between the Pauls and the new parties is unpersuasive. Plaintiff Messing had ample time to join the three new parties before the Court entered its Order granting Summary Judgment.

Finally, in the interest of comity with the Lawrence Circuit Court, the Court reiterates it shall abstain from hearing the remaining claims. According to the Sixth Circuit in Gorenc v. Westland,

2003 WL 21782610 (6th Cir. (Mich)), "federal courts must abstain from hearing challenges to pending state court proceedings where the state's interest is so important that exercising federal jurisdiction would disrupt the comity between federal and state courts." For the reasons state below, the Court agrees with the Defendants that abstention was proper.

Plaintiff Messing states in her motion, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." Colorado River, at 813. However, in certain circumstances abstention is warranted based on "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." Colorado River, at 817. As the Plaintiff correctly states in her motion, the Sixth Circuit employs an eight part test "a district court must consider when deciding whether to abstain from exercising its jurisdiction due to the concurrent jurisdiction of a state court." Paine Webber, at 206. However, "'the decision whether to dismiss a federal action because of parallel state court litigation does not rest on a mechanical checklist, but on a careful balancing of the important factors as they apply in a given case.'" Paine Webber, at 207, quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corporation, 460 U.S. 1, 16 (1983).

Applying the Paine Webber test, the Court finds several factors in favor of abstention. First, the Lawrence Circuit Court has taken jurisdiction over Mr. Messing's mortgage interest in land and minerals owned by the Defendants by requiring the posting of a supercedeas bond for the appeal in the Hiroc Case.

This required Mr. Messing to sign a subordination agreement, subordinating his rights as first lien holder of a mortgage of gas and oil rights on land owned by the Defendant Pauls. Mr. Messing's representative, the Plaintiff in this case, now challenges the validity of that subordination agreement. As the Court stated in its Memorandum Opinion and Order, the issue of the validity of the subordination agreement is intimately bound up with the appeal undertaken in the Hiroc suit. The Lawrence Circuit Court is the proper forum to decide the sufficiency of the supercedeas bond, and as a corollary, the validity of the subordination agreement.

The Court's decision to abstain from deciding the remaining claims helps avoid piecemeal litigation. AS a practical matter, allowing the Lawrence Circuit court to rule on the remaining claims allows for a consistent decision making process because the state court can gather all the parties and claims before it. As noted above, the Plaintiff's claim regarding the validity of the subordination agreement is intertwined with the pending Hiroc claims in state court. Further, the Cadle Company claims regarding the sale of land and minerals underlying this dispute are best left to the Lawrence Circuit Court. As the Court stated in its previous Order, "[t]o set aside any monies or proceeds as Cadle requests prior to the ruling of the Lawrence Circuit Court would again violate comity." Additionally, as the Plaintiff concedes, "the adjudication of the relevant claims of the parties are governed by state law." The Court agrees with the Defendant that "Kentucky's state courts are the proper forum for the adjudication of the issues pertaining to title and disposition of Kentucky

property, especially when that property has already been accepted by the Lawrence Circuit Court as security for a supercedeas bond."

The Court agrees with the Defendants that the issues regarding the subordination agreement are inextricably intertwined with claims asserted in the state court proceedings. The decision to exercise Burford abstention "balances the strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court, against the State's interest in maintaining 'uniformity in the treatment of an essentially local problem.'" Caudill v. Eubanks Farms, Inc., 301 F.3d 658, 659 (6th Cir. 2002), quoting New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans, 491 U.S. 350, 362 (1989). The Court believes that the Plaintiff's claims are "essentially a local problem," and would be best left to decision by the state courts.

As previously stated, the Lawrence Circuit Court has already taken jurisdiction over the claims regarding the subordination agreement by requiring the posting of a supercedeas bond in the Hiroc litigation. Further, Plaintiff Messing concedes the Messing estate will have to be joined as a defendant in the Hiroc case if the plaintiffs in that case prevail. As the Defendants note, it would not be proper for this Court to rule on issues pertaining to the effect and validity of the subordination agreement "that might adversely affect the rights of the parties...currently before the Lawrence Circuit Court in the Hiroc litigation."

ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED THAT:

(1) the Plaintiff's Motion to Alter or Amend Judgment is **SUSTAINED** in part, and **OVERRULED** in part.

This 18th day of November, 2003.

"s/Henry R. Wilhoit, Jr."
Senior District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
ASHLAND

No. 00-168-HRW

[Eastern District of Kentucky
Filed November 21, 2003
At Ashland
Leslie G. Whitmer
Clerk, U.S. District Court]

ERIN MESSING, as executrix of the estate of Andrew Messing,	)
Plaintiff-Appellee/Cross-Appellant	)
v.	)
C. LESTER PAUL, et al.,	)
Defendants-Appellants/ Cross-Appellees	)

AMENDED ORDER

In compliance with Federal Rule of Civil Procedure 58, **IT IS HEREBY ORDERED** and **ADJUDGED** that:

(1) the "loan documents" subject to enforcement are the Loan Agreement, dated November 25, 1997; the Stock Pledge Agreement, dated November 25, 1997; and the First Note, dated November 25, 1997;

(2) the Plaintiff is due a sum certain of $600,000;

(3) the Plaintiff is entitled to prejudgment interest in the amount of $217,244.42 for the period ending on July 7, 2001, and $166.70 per day from July 7, 2001 until the judgment is rendered;

(4) the Plaintiff is entitled to attorneys fees in the amount of $73,335.35;

(5) Defendants Michael W. Paul, Sr., and Timothy C. Paul are not liable in their individual capacities for the debts incurred by the Defendant Paul entities;

(6) Plaintiff Messing's motion to file a supplemental complaint and join three additional defendants is **OVERRULED** as untimely; and

(7) Plaintiff Messing's motion that the Court reconsider its decision to abstain from

ruling upon the remaining claims is **OVERRULED**.

All issues having been resolved, this matter is **DISMISSED** and **STRICKEN** from the docket of this Court.

This is a **FINAL** and **APPEALABLE** Order.

This 18th day of November, 2003.

"s/Henry R. Wilhoit, Jr.
Senior U.S. District Judge